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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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LINGLE, GOVERNOR OF HAWAII, ET AL. *v.* CHEVRON U. S. A. INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–163. Argued February 22, 2005—Decided May 23, 2005

Concerned about the effects of market concentration on retail gasoline prices, the Hawaii Legislature passed Act 257, which limits the rent oil companies may charge dealers leasing company-owned service stations. Respondent Chevron U. S. A. Inc., then one of the largest oil companies in Hawaii, brought this suit seeking a declaration that the rent cap effected an unconstitutional taking of its property and an injunction against application of the cap to its stations. Applying *Agins* v. *City of Tiburon*, 447 U. S. 255, 260—where this Court declared that government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests"—the District Court held that the rent cap effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii's asserted interest in controlling retail gas prices. The Ninth Circuit affirmed.

Held: Agins' "substantially advance[s]" formula is not an appropriate test for determining whether a regulation effects a Fifth Amendment taking. Pp. 6–19.

(a) The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U. S. 114. Beginning with *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, however, the Court recognized that government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster. Regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, or (2)

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where regulations completely deprive an owner of "*all* economically beneficial us[e]" of her property, *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1019. Outside these two categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124. *Penn Central* identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking. Because the three inquiries reflected in *Loretto*, *Lucas*, and *Penn Central* all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property, each of them focuses upon the severity of the burden that government imposes upon property rights. Pp. 6–10.

(b) The "substantially advances" formula is not a valid method of identifying compensable regulatory takings. It prescribes an inquiry in the nature of a due process test, which has no proper place in the Court's takings jurisprudence. The formula unquestionably was derived from due process precedents, since *Agins* supported it with citations to *Nectow* v. *Cambridge*, 277 U. S. 183, 185, and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395. Although *Agins*' reliance on those precedents is understandable when viewed in historical context, the language the Court selected was imprecise. It suggests a means-ends test, asking, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. Such an inquiry is not a valid method of discerning whether private property has been "taken" for Fifth Amendment purposes. In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how any regulatory burden is *distributed* among property owners. Thus, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause. Moreover, the *Agins* formula's application as a takings test would present serious practical difficulties. Reading it to demand heightened means-ends review of virtually all regulation of private property would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which they are not well suited. It would also empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert

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agencies. Pp. 10–15.

(c) The Court's holding here does not require it to disturb any of its prior holdings. Although it applied a "substantially advances" inquiry in *Agins* itself, see 447 U. S., at 261–262, and arguably in *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 485–492, it has never found a compensable taking based on such an inquiry. Moreover, in most of the cases reciting the *Agins* formula, the Court has merely assumed its validity when referring to it in dicta. See, *e.g.*, *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 334. Although *Nollan* v. *California Coastal Commission*, 483 U. S. 825, 834, and *Dolan* v. *City of Tigard*, 512 U. S. 374, 385, drew upon *Agins*' language, the rule those cases established is entirely distinct from the "substantially advances" test: They involved a special application of the "doctrine of unconstitutional conditions," which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. *Ibid.* Pp. 16–18.

(d) A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking, a *Lucas*-type total regulatory taking, a *Penn Central* taking, or a land-use exaction violating the *Nollan* and *Dolan* standards. Because Chevron argued only a "substantially advances" theory, it was not entitled to summary judgment on its takings claim. Pp. 18–19.

363 F. 3d 846, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion.

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SUPREME COURT OF THE UNITED STATES

No. 04–163

LINDA LINGLE, GOVERNOR OF HAWAII, ET AL., PETITIONERS *v.* CHEVRON U. S. A. INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 23, 2005]

JUSTICE O'CONNOR delivered the opinion of the Court.

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined. A quarter century ago, in *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." *Id.*, at 260. Through reiteration in a half dozen or so decisions since *Agins*, this language has been ensconced in our Fifth Amendment takings jurisprudence. See *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 704 (1999) (citing cases).

In the case before us, the lower courts applied *Agins*' "substantially advances" formula to strike down a Hawaii statute that limits the rent that oil companies may charge to dealers who lease service stations owned by the companies. The lower courts held that the rent cap effects an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii's asserted interest in con-

trolling retail gasoline prices. This case requires us to decide whether the "substantially advances" formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.

I

The State of Hawaii, whose territory comprises an archipelago of 132 islands clustered in the midst of the Pacific Ocean, is located over 1,600 miles from the U. S. mainland and ranks among the least populous of the 50 States. Because of Hawaii's small size and geographic isolation, its wholesale market for oil products is highly concentrated. When this lawsuit began in 1997, only two refineries and six gasoline wholesalers were doing business in the State. As of that time, respondent Chevron U. S. A. Inc. was the largest refiner and marketer of gasoline in Hawaii: It controlled 60 percent of the market for gasoline produced or refined in-state and 30 percent of the wholesale market on the State's most populous island, Oahu.

Gasoline is sold at retail in Hawaii from about 300 different service stations. About half of these stations are leased from oil companies by independent lessee-dealers, another 75 or so are owned and operated by "open" dealers, and the remainder are owned and operated by the oil companies. Chevron sells most of its product through 64 independent lessee-dealer stations. In a typical lessee-dealer arrangement, Chevron buys or leases land from a third party, builds a service station, and then leases the station to a dealer on a turnkey basis. Chevron charges the lessee-dealer a monthly rent, defined as a percentage of the dealer's margin on retail sales of gasoline and other goods. In addition, Chevron requires the lessee-dealer to enter into a supply contract, under which the dealer agrees to purchase from Chevron whatever is necessary to

satisfy demand at the station for Chevron's product. Chevron unilaterally sets the wholesale price of its product.

The Hawaii Legislature enacted Act 257 in June 1997, apparently in response to concerns about the effects of market concentration on retail gasoline prices. See 1997 Haw. Sess. Laws no. 257, §1. The statute seeks to protect independent dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies. It prohibits oil companies from converting existing lessee-dealer stations to company-operated stations and from locating new company-operated stations in close proximity to existing dealer-operated stations. Haw. Rev. Stat. §§486H–10.4(a), (b) (1998 Cum. Supp.). More importantly for present purposes, Act 257 limits the amount of rent that an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline. §486H–10.4(c).

Thirty days after Act 257's enactment, Chevron sued the Governor and Attorney General of Hawaii in their official capacities (collectively Hawaii) in the United States District Court for the District of Hawaii, raising several federal constitutional challenges to the statute. As pertinent here, Chevron claimed that the statute's rent cap provision, on its face, effected a taking of Chevron's property in violation of the Fifth and Fourteenth Amendments. Chevron sought a declaration to this effect as well as an injunction against the application of the rent cap to its stations. Chevron swiftly moved for summary judgment on its takings claim, arguing that the rent cap does not substantially advance any legitimate government interest. Hawaii filed a cross-motion for summary judgment on all of Chevron's claims.

To facilitate resolution of the summary judgment motions, the parties jointly stipulated to certain relevant facts. They agreed that Act 257 reduces by about

$207,000 per year the aggregate rent that Chevron would otherwise charge on 11 of its 64 lessee-dealer stations. On the other hand, the statute allows Chevron to collect more rent than it would otherwise charge at its remaining 53 lessee-dealer stations, such that Chevron could increase its overall rental income from all 64 stations by nearly $1.1 million per year. The parties further stipulated that, over the past 20 years, Chevron has not fully recovered the costs of maintaining lessee-dealer stations in any State through rent alone. Rather, the company recoups its expenses through a combination of rent and product sales. Finally, the joint stipulation states that Chevron has earned in the past, and anticipates that it will continue to earn under Act 257, a return on its investment in lessee-dealer stations in Hawaii that satisfies any constitutional standard.

The District Court granted summary judgment to Chevron, holding that "Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments." *Chevron U. S. A. Inc.* v. *Cayetano*, 57 F. Supp. 2d 1003, 1014 (1998). The District Court accepted Hawaii's argument that the rent cap was intended to prevent concentration of the retail gasoline market—and, more importantly, resultant high prices for consumers—by maintaining the viability of independent lessee-dealers. *Id.*, at 1009–1010. The court concluded that the statute would not substantially advance this interest, however, because it would not actually reduce lessee-dealers' costs or retail prices. It found that the rent cap would allow incumbent lessee-dealers, upon transferring occupancy rights to a new lessee, to charge the incoming lessee a premium reflecting the value of the rent reduction. Accordingly, the District Court reasoned, the incoming lessee's overall expenses would be the same as in the absence of the rent cap, so there would be no savings to

pass along to consumers. *Id.*, at 1010–1012. Nor would incumbent lessees benefit from the rent cap, the court found, because the oil company lessors would unilaterally raise wholesale fuel prices in order to offset the reduction in their rental income. *Id.*, at 1012–1014.

On appeal, a divided panel of the Court of Appeals for the Ninth Circuit held that the District Court had applied the correct legal standard to Chevron's takings claim. *Chevron U. S. A. Inc.* v. *Cayetano*, 224 F. 3d 1030, 1033–1037 (2000). The Court of Appeals vacated the grant of summary judgment, however, on the ground that a genuine issue of material fact remained as to whether the Act would benefit consumers. *Id.*, at 1037–1042. Judge William Fletcher concurred in the judgment, maintaining that the "reasonableness" standard applicable to "ordinary rent and price control laws" should instead govern Chevron's claim. *Id.*, at 1048.

On remand, the District Court entered judgment for Chevron after a 1-day bench trial in which Chevron and Hawaii called competing expert witnesses (both economists) to testify. 198 F. Supp. 2d 1182 (2002). Finding Chevron's expert witness to be "more persuasive" than the State's expert, the District Court once again concluded that oil companies would raise wholesale gasoline prices to offset any rent reduction required by Act 257, and that the result would be an increase in retail gasoline prices. *Id.*, at 1187–1189. Even if the rent cap did reduce lessee-dealers' costs, the court found, they would not pass on any savings to consumers. *Id.*, at 1189. The court went on to reiterate its determination that Act 257 would enable incumbent lessee-dealers to sell their leaseholds at a premium, such that incoming lessees would not obtain any of the benefits of the rent cap. *Id.*, at 1189–1190. And while it acknowledged that the rent cap could preclude oil companies from constructively evicting dealers through excessive rents, the court found no evidence that Chevron

or any other oil company would attempt to charge such rents in the absence of the cap. *Id.*, at 1191. Finally, the court concluded that Act 257 would in fact decrease the number of lessee-dealer stations because the rent cap would discourage oil companies from building such stations. *Id.*, at 1191–1192. Based on these findings, the District Court held that "Act 257 effect[ed] an unconstitutional regulatory taking given its failure to substantially advance any legitimate state interest." *Id.*, at 1193.

The Ninth Circuit affirmed, holding that its decision in the prior appeal barred Hawaii from challenging the application of the "substantially advances" test to Chevron's takings claim or from arguing for a more deferential standard of review. 363 F. 3d 846, 849–855 (2004). The panel majority went on to reject Hawaii's challenge to the application of the standard to the facts of the case. *Id.*, at 855–858. Judge Fletcher dissented, renewing his contention that Act 257 should not be reviewed under the "substantially advances" standard. *Id.*, at 859–861. We granted certiorari, 543 U. S. ___ (2004), and now reverse.

II

A

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314 (1987). In other words, it "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a

taking." *Id.*, at 315 (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); see also *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325 (1893).

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945) (Government's occupation of private warehouse effected a taking). Indeed, until the Court's watershed decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), "it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) (citations omitted and emphasis added; brackets in original); see also *id.*, at 1028, n. 15 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such "regulatory takings" may be compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. The rub, of course, has been—and remains—how to discern how far is "too far." In answering

that question, we must remain cognizant that "government regulation—by definition—involves the adjustment of rights for the public good," *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979), and that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Mahon*, *supra*, at 413.

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. *Lucas*, 505 U. S., at 1019 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.*, at 1026–1032.

Outside these two relatively narrow categories (and the special context of land-use exactions discussed below, see *infra*, at 16–18), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." *Id.*, at 124. Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed

expectations." *Ibid.* In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, *e.g.*, *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617–618 (2001); *id.*, at 632–634 (O'CONNOR, J., concurring).

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. See *Dolan* v. *City of Tigard*, 512 U. S. 374, 384 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 831–832 (1987); *Loretto*, *supra*, at 433; *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979). In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. See *Lucas*, *supra*, at 1017 (positing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation").

And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

B

In *Agins* v. *City of Tiburon*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 138, n. 36 (1978)." 447 U. S., at 260. Because this statement is phrased in the disjunctive, *Agins*' "substantially advances" language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test. Indeed, the lower courts in this case struck down Hawaii's rent control statute as an "unconstitutional regulatory taking," 198 F. Supp. 2d, at 1193, based solely upon a finding that it does not substantially advance the State's asserted interest in controlling retail gasoline prices. See *supra*, at 6–7. Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins*, this is our first opportunity to consider its validity as a free-standing takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.

There is no question that the "substantially advances" formula was derived from due process, not takings, precedents. In support of this new language, *Agins* cited *Nectow* v. *Cambridge*, 277 U. S. 183, a 1928 case in which the plaintiff claimed that a city zoning ordinance "deprived

him of his property without due process of law in contravention of the Fourteenth Amendment," *id.*, at 185. *Agins* then went on to discuss *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare.*" *Id.*, at 395 (emphasis added); see also *Nectow*, *supra*, at 188 (quoting the same "substantial relation" language from *Euclid*).

When viewed in historical context, the Court's reliance on *Nectow* and *Euclid* is understandable. *Agins* was the Court's first case involving a challenge to zoning regulations in many decades, so it was natural to turn to these seminal zoning precedents for guidance. See Brief for United States as *Amicus Curiae* in *Agins* v. *City of Tiburon*, O. T. 1979, No. 602, pp. 12–13 (arguing that *Euclid* "set out the principles applicable to a determination of the facial validity of a zoning ordinance attacked as a violation of the Takings Clause of the Fifth Amendment"). Moreover, *Agins*' apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in *Penn Central*. See 438 U. S., at 127 (stating in dicta that "[i]t is . . . implicit in *Goldblatt* [v. *Hempstead*, 369 U. S. 590 (1962),] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow* v. *Cambridge*, *supra*"). But see *Goldblatt*, *supra*, at 594–595 (quoting "'reasonably necessary'" language from *Lawton* v. *Steele*, 152 U. S. 133, 137 (1894), a due process case, and applying a deferential "'reasonableness'" standard to determine whether a challenged regulation was a "valid exercise of the . . . police power" under the Due Process Clause). Finally, when *Agins* was decided, there had been some history of referring to depri-

vations of property without due process of law as "takings," see, *e.g.*, *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 740 (1970), and the Court had yet to clarify whether "regulatory takings" claims were properly cognizable under the Takings Clause or the Due Process Clause, see *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Jefferson City*, 473 U. S. 172, 197–199 (1985).

Although *Agins*' reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, *e.g.*, *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Chevron appeals to the general principle that the Takings Clause is meant "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Brief for Respondent 17–21 (quoting *Armstrong*, 364 U. S., at 49). But that appeal is clearly misplaced, for the reasons just indicated. A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use*." It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." *First English Evangelical Lutheran Church*, 482 U. S., at 315 (emphasis added). Conversely, if a government action is found to be impermissi-

ble—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Chevron's challenge to the Hawaii statute in this case illustrates the flaws in the "substantially advances" theory. To begin with, it is unclear how significantly Hawaii's rent cap actually burdens Chevron's property rights. The parties stipulated below that the cap would reduce Chevron's aggregate rental income on 11 of its 64 lessee-dealer stations by about $207,000 per year, but that Chevron nevertheless expects to receive a return on its investment in these stations that satisfies any constitutional standard. See *supra*, at 4. Moreover, Chevron asserted below, and the District Court found, that Chevron would recoup any reductions in its rental income by raising wholesale gasoline prices. See *supra*, at 5. In short, Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden. Rather, the gravamen of Chevron's claim is simply that Hawaii's rent cap will not actually serve the State's legitimate interest in protecting consumers against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause. Chevron plainly does not seek compensation for a taking of its property for a legitimate public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.

Finally, the "substantially advances" formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it

would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. See 198 F. Supp. 2d, at 1187–1193. Along the way, the court determined that the State was not entitled to enact a prophylactic rent cap without actual evidence that oil companies had charged, or would charge, excessive rents. See *id.*, at 1191. Based on these findings, the District Court enjoined further enforcement of Act 257's rent cap provision against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. See, *e.g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978); *Ferguson* v. *Skrupa*, 372 U. S. 726, 730–732 (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.

For the foregoing reasons, we conclude that the "substantially advances" formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. Since Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim.

III

We emphasize that our holding today—that the "substantially advances" formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in *Agins* itself, see 447 U. S., at 261–262 (finding that the challenged zoning ordinances "substantially advance[d] legitimate governmental goals"), and arguably also in *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 485–492 (1987) (quoting "'substantially advance[s]'" language and then finding that the challenged statute was intended to further a substantial public interest). But in no case have we found a compensable taking based on such an inquiry. Indeed, in most of the cases reciting the "substantially advances" formula, the Court has merely assumed its validity when referring to it in dicta. See *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 334 (2002); *Del Monte Dunes*, 526 U. S., at 704; *Lucas*, 505 U. S., at 1016; *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 126 (1985).

It might be argued that this formula played a role in our decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994). See Brief for Respondent 21–23. But while the Court drew upon the language of *Agins* in these cases, it did not apply the "substantially advances" test that is the subject of today's decision. Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. See *Dolan*, *supra*, at 379–380 (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path); *Nollan*, *supra*, at 828

(permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line).

In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. *Dolan*, *supra*, at 384; *Nollan*, *supra*, at 831–832. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. The Court in *Nolan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. 483 U. S., at 834–837. The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be "'rough[ly] proportiona[l]' . . . both in nature and extent to the impact of the proposed development." 512 U. S., at 391; see also *Del Monte Dunes*, *supra*, at 702 (emphasizing that we have not extended this standard "beyond the special context of [such] exactions").

Although *Nollan* and *Dolan* quoted *Agins*' language, see *Dolan*, *supra*, at 385; *Nollan*, *supra*, at 834, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. See *Dolan*, *supra*, at 387–388; *Nollan*,

supra, at 841. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." 512 U. S., at 385. That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

* * *

Twenty-five years ago, the Court posited that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interes[t]." *Agins*, *supra*, at 260. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. Because Chevron argued only a "substantially

advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–163

LINDA LINGLE, GOVERNOR OF HAWAII, ET AL., PETITIONERS *v.* CHEVRON U. S. A. INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 23, 2005]

JUSTICE KENNEDY, concurring.

This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 539 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. Chevron voluntarily dismissed its due process claim without prejudice, however, and we have no occasion to consider whether Act 257 of the 1997 Hawaii Session Laws "represents one of the rare instances in which even such a permissive standard has been violated." *Apfel*, *supra*, at 550. With these observations, I join the opinion of the Court.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRANHOLM, GOVERNOR OF MICHIGAN, ET AL. *v.* HEALD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–1116. Argued December 7, 2004—Decided May 16, 2005*

Michigan and New York regulate the sale and importation of wine through three-tier systems requiring separate licenses for producers, wholesalers, and retailers. These schemes allow in-state, but not out-of-state, wineries to make direct sales to consumers. This differential treatment explicitly discriminates against interstate commerce by limiting the emerging and significant direct-sale business. Influenced by an increasing number of small wineries and a decreasing number of wine wholesalers, direct sales have grown because small wineries may not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. In Nos. 03–1116 and 03–1120, Michigan residents, joined by an intervening out-of-state winery, sued Michigan officials, claiming that the State's laws violate the Commerce Clause. The State and an intervening in-state wholesalers association responded that the direct-shipment ban was a valid exercise of Michigan's power under the Twenty-first Amendment. The District Court sustained the scheme, but the Sixth Circuit reversed, rejecting the argument that the Twenty-first Amendment immunizes state liquor laws from Commerce Clause strictures and holding that there was no showing that the State could not meet its proffered policy objectives through nondiscriminatory means. In No. 03–1274, out-of-state win-

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*Together with No. 03–1120, *Michigan Beer & Wine Wholesalers Assn.* v. *Heald et al.*, also on certiorari to the same court, and No. 03–1274, *Swedenburg et al.* v. *Kelly, Chairman, New York Division of Alcoholic Beverage Control, State Liquor Authority, et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

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eries and their New York customers filed suit against state officials, seeking, *inter alia*, a declaration that the State's direct-shipment laws violate the Commerce Clause. State liquor wholesalers and retailers' representatives intervened in support of the State. The District Court granted the plaintiffs summary judgment, but the Second Circuit reversed, holding that New York's laws fell within the ambit of its powers under the Twenty-first Amendment. Here, respondents in the Michigan cases and petitioners in the New York case are referred to as the wineries, while the opposing parties are referred to as the States.

Held: Both States' laws discriminate against interstate commerce in violation of the Commerce Clause, and that discrimination is neither authorized nor permitted by the Twenty-first Amendment. Pp. 8–30.

(a) This Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99. Laws such as those at issue contradict the principles underlying this rule by depriving citizens of their right to have access to other States' markets on equal terms. The Michigan system's discriminatory character is obvious. It allows in-state wineries to ship directly to consumers, subject only to a licensing requirement, but out-of-state wineries, even if licensed, must go through a wholesaler and retailer. The resulting price differential, plus the possible inability to secure a wholesaler for small shipments, can effectively bar small wineries from Michigan's market. New York's scheme also grants in-state wineries access to state consumers on preferential terms. It allows in-state wineries to ship directly to consumers, but requires an out-of-state winery to open a New York branch office and warehouse, which drives up its costs. Out-of-state wineries are also ineligible for a "farm winery" license, which provides the most direct means of shipping to New York consumers. Pp. 8–12.

(b) Section 2 of the Twenty-first Amendment does not allow States to regulate direct shipment of wine on terms that discriminate in favor of in-state producers. The States' position is inconsistent with this Court's precedents and the Amendment's history. Pp. 12–26.

(1) This Court invalidated many state liquor regulations before the Eighteenth Amendment's ratification, finding either that the Commerce Clause prevented States from discriminating against imported liquor, *Scott* v. *Donald*, 165 U. S. 58, or that States could not pass facially neutral laws that placed an impermissible burden on interstate commerce, *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465. While States could ban domestic liquor production, *Mugler*

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v. *Kansas*, 123 U. S. 623, such laws were ineffective because they could not regulate imported liquor in its original package, *Leisy* v. *Hardin*, 135 U. S. 100. To resolve this matter, Congress passed the Wilson Act, which empowered the States to regulate imported liquor on the same terms as domestic liquor. After this Court narrowly construed the Act to permit regulation of the resale of imported liquor, not its direct shipment to consumers, *Rhodes* v. *Iowa*, 170 U. S. 412, Congress passed the Webb-Kenyon Act to close the direct-shipment loophole, see *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311. The States argue that the Webb-Kenyon Act went further, removing any barrier to discriminatory state liquor regulations, but that reading conflicts with *Clark Distilling*'s description of the Webb-Kenyon Act's purpose, which was simply to extend the Wilson Act. Nor does the statute's text compel a different response. At the very least, it expresses no clear congressional intent to depart from the principle disfavoring discrimination against out-of-state goods. Last, and most importantly, the Webb-Kenyon Act did not purport to repeal the Wilson Act, which expressly precludes state discrimination. The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's Commerce Clause cases striking down state laws that discriminated against out-of-state liquor. States were required to regulate domestic and imported liquor on equal terms. Pp. 12–21.

(2) A brief respite from these legal battles brought on by the Eighteenth Amendment's ratification ended with the Twenty-first Amendment. The States contend that §2 of the Twenty-first Amendment transfers to States the authority to discriminate against out-of-state goods, but the pre-Amendment history recited here provides strong support for the view that §2 only restored to the States the powers they had under the Wilson and Webb-Kenyon Acts. The Twenty-first Amendment's aim was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. It did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they never enjoyed. Cases decided soon after the Twenty-first Amendment's ratification did not take account of the underlying history and were inconsistent with this view, *e.g.*, *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, but the Court's reluctance to consider this history did not reflect a consensus that such evidence was irrelevant or that prior history was unsupportive of the principle that the Amendment did not authorize discrimination against out-of-state liquor. More recent cases confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own

producers. Pp. 21–23.

(3) This Court has held, in the modern §2 cases, (1) that state laws violating other provisions of the Constitution are not saved by the Twenty-first Amendment, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, (2) that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, and (3) as most relevant here, that state regulation of alcohol is limited by the Commerce Clause's nondiscrimination principle, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 276. *Bacchus*, which dealt with a Hawaii excise tax exempting some in-state alcoholic beverages, provides a particularly telling example of this last proposition, and this Court declines the States' suggestion to overrule or limit that case. The decision to invalidate the instant direct-shipment laws also does not call into question their three-tier systems' constitutionality, see *North Dakota* v. *United States*, 495 U. S. 423, 432. State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. In contrast, the instant cases involve straightforward attempts to discriminate in favor of local producers. Pp. 23–26.

(c) Concluding that the States' direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry, for this Court must still consider whether either State's regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278. The States provide little evidence for their claim that purchasing wine over the Internet by minors is a problem. The 26 States now permitting direct shipments report no such problem, and the States can minimize any risk with less restrictive steps, such as requiring an adult signature on delivery. The States' tax evasion justification is also insufficient. Increased direct shipment, whether in or out of state, brings the potential for tax evasion. However, this argument is a diversion with regard to Michigan, which does not rely on in-state wholesalers to collect taxes on out-of-state wines. New York's tax collection objectives can be achieved without discriminating against interstate commerce, *e.g.*, by requiring a permit as a condition of direct shipping, which is what it does for in-state wineries. Both States also benefit from federal laws that supply incentives for wineries to comply with state regulations. Other rationales—facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability—can also be achieved through the alternative of an evenhanded licensing requirement. Pp. 26–29.

Nos. 03–1116 and 03–1120, 342 F. 3d 517, affirmed; No. 03–1274, 358

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F. 3d 223, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which O'CONNOR, J., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and STEVENS and O'CONNOR, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 03–1116, 03–1120 and 03–1274

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, ET AL., PETITIONERS
03–1116 v.
ELEANOR HEALD ET AL.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, PETITIONER
03–1120 v.
ELEANOR HEALD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUANITA SWEDENBURG, ET AL., PETITIONERS
03–1274 v.
EDWARD D. KELLY, CHAIRMAN, NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE LIQUOR AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 16, 2005]

JUSTICE KENNEDY delivered the opinion of the Court.

These consolidated cases present challenges to state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. The details and

mechanics of the two regulatory schemes differ, but the object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint. It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders.

We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, §8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment. Accordingly, we affirm the judgment of the Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws; and we reverse the judgment of the Court of Appeals for the Second Circuit, which upheld the New York laws.

I

Like many other States, Michigan and New York regulate the sale and importation of alcoholic beverages, including wine, through a three-tier distribution system. Separate licenses are required for producers, wholesalers, and retailers. See FTC, Possible Anticompetitive Barriers to E-Commerce: Wine 5–7 (July 2003) (hereinafter FTC Report), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (all Internet materials as visited May 11, 2005, and available in Clerk of Court's case file). The three-tier scheme is preserved by a complex set of overlapping state and federal regulations. For example, both state and federal laws limit vertical integration between tiers. *Id.*, at 5; 27 U. S. C. §205; see, *e.g.*, *Bainbridge* v. *Turner*, 311 F. 3d 1104, 1106 (CA11 2002). We have held previously that States can mandate a three-tier distribution scheme in the exercise of their authority under the

Twenty-first Amendment. *North Dakota* v. *United States*, 495 U. S. 423, 432 (1990); *id.*, at 447 (SCALIA, J., concurring in judgment). As relevant to today's cases, though, the three-tier system is, in broad terms and with refinements to be discussed, mandated by Michigan and New York only for sales from out-of-state wineries. In-state wineries, by contrast, can obtain a license for direct sales to consumers. The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.

This discrimination substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business. FTC Report 7. From 1994 to 1999, consumer spending on direct wine shipments doubled, reaching $500 million per year, or three percent of all wine sales. *Id.*, at 5. The expansion has been influenced by several related trends. First, the number of small wineries in the United States has significantly increased. By some estimates there are over 3,000 wineries in the country, WineAmerica, The National Association of American Wineries, Wine Facts 2004, http://www.americanwineries.org/newsroom/winefacts04.htm, more than three times the number 30 years ago, FTC Report 6. At the same time, the wholesale market has consolidated. Between 1984 and 2002, the number of licensed wholesalers dropped from 1,600 to 600. Riekhof & Sykuta, Regulating Wine by Mail, 27 Regulation, No. 3, pp. 30, 31 (Fall 2004), available at http://www.cato.org/pubs/regulation/regv27n3/v27n3-3.pdf. The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. FTC Report 6. This has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel.

Approximately 26 States allow some direct shipping of wine, with various restrictions. Thirteen of these States have reciprocity laws, which allow direct shipment from wineries outside the State, provided the State of origin affords similar nondiscriminatory treatment. *Id.*, at 7–8. In many parts of the country, however, state laws that prohibit or severely restrict direct shipments deprive consumers of access to the direct market. According to the Federal Trade Commission (FTC), "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *Id.*, at 3.

The wine producers in the cases before us are small wineries that rely on direct consumer sales as an important part of their businesses. Domaine Alfred, one of the plaintiffs in the Michigan suit, is a small winery located in San Luis Obispo, California. It produces 3,000 cases of wine per year. Domaine Alfred has received requests for its wine from Michigan consumers but cannot fill the orders because of the State's direct-shipment ban. Even if the winery could find a Michigan wholesaler to distribute its wine, the wholesaler's markup would render shipment through the three-tier system economically infeasible.

Similarly, Juanita Swedenburg and David Lucas, two of the plaintiffs in the New York suit, operate small wineries in Virginia (the Swedenburg Estate Vineyard) and California (the Lucas Winery). Some of their customers are tourists, from other States, who purchase wine while visiting the wineries. If these customers wish to obtain Swedenburg or Lucas wines after they return home, they will be unable to do so if they reside in a State with restrictive direct-shipment laws. For example, Swedenburg and Lucas are unable to fill orders from New York, the Nation's second-largest wine market, because of the limits that State imposes on direct wine shipments.

A

We first address the background of the suit challenging the Michigan direct-shipment law. Most alcoholic beverages in Michigan are distributed through the State's three-tier system. Producers or distillers of alcoholic beverages, whether located in state or out of state, generally may sell only to licensed in-state wholesalers. Mich. Comp. Laws Ann. §§436.1109(1), 436.1305, 436.1403, 436.1607(1) (West 2000); Mich. Admin. Code Rules 436.1705 (1990), 436.1719 (2000). Wholesalers, in turn, may sell only to in-state retailers. Mich. Comp. Laws Ann. §§436.1113(7), 436.1607(1) (West 2001). Licensed retailers are the final link in the chain, selling alcoholic beverages to consumers at retail locations and, subject to certain restrictions, through home delivery. §§436.1111(5), 436.1203(2)–(4).

Under Michigan law, wine producers, as a general matter, must distribute their wine through wholesalers. There is, however, an exception for Michigan's approximately 40 in-state wineries, which are eligible for "wine maker" licenses that allow direct shipment to in-state consumers. §436.1113(9) (West 2001); §§436.1537(2)–(3) (West Supp. 2004); Mich. Admin. Code Rule 436.1011(7)(b) (2003). The cost of the license varies with the size of the winery. For a small winery, the license is $25. Mich. Comp. Laws Ann. §436.1525(1)(d) (West Supp. 2004). Out-of-state wineries can apply for a $300 "outside seller of wine" license, but this license only allows them to sell to in-state wholesalers. §§436.1109(9) (West 2001), 436.1525(1)(e) (West Supp. 2004); Mich. Admin. Code Rule 436.1719(5) (2000).

Some Michigan residents brought suit against various state officials in the United States District Court for the Eastern District of Michigan. Domaine Alfred, the San Luis Obispo winery, joined in the suit. The plaintiffs contended that Michigan's direct-shipment laws discriminated

against interstate commerce in violation of the Commerce Clause. The trade association Michigan Beer & Wine Wholesalers intervened as a defendant. Both the State and the wholesalers argued that the ban on direct shipment from out-of-state wineries is a valid exercise of Michigan's power under §2 of the Twenty-first Amendment.

On cross-motions for summary judgment the District Court sustained the Michigan scheme. The Court of Appeals for the Sixth Circuit reversed. *Heald* v. *Engler*, 342 F. 3d 517 (2003). Relying on *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), the court rejected the argument that the Twenty-first Amendment immunizes all state liquor laws from the strictures of the Commerce Clause, 342 F. 3d, at 524, and held the Michigan scheme was unconstitutional because the defendants failed to demonstrate the State could not meet its proffered policy objectives through nondiscriminatory means, *id.*, at 527.

B

New York's licensing scheme is somewhat different. It channels most wine sales through the three-tier system, but it too makes exceptions for in-state wineries. As in Michigan, the result is to allow local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries. Wineries that produce wine only from New York grapes can apply for a license that allows direct shipment to in-state consumers. N. Y. Alco. Bev. Cont. Law Ann. §76–a(3) (West Supp. 2005) (hereinafter N. Y. ABC Law). These licensees are authorized to deliver the wines of other wineries as well, §76–a(6)(a), but only if the wine is made from grapes "at least seventy-five percent the volume of which were grown in New York state," §3(20–a). An out-of-state winery may ship directly to New York consumers only if it becomes a licensed New York winery, which requires the establishment of "a branch factory, office or storeroom within the state of New York." §3(37).

Juanita Swedenburg and David Lucas, joined by three of their New York customers, brought suit in the Southern District of New York against the officials responsible for administering New York's Alcoholic Beverage Control Law seeking, *inter alia*, a declaration that the State's limitations on the direct shipment of out-of-state wine violate the Commerce Clause. New York liquor wholesalers and representatives of New York liquor retailers intervened in support of the State.

The District Court granted summary judgment to the plaintiffs. 232 F. Supp. 2d 135 (2002). The court first determined that, under established Commerce Clause principles, the New York direct-shipment scheme discriminates against out-of-state wineries. *Id.*, at 146–147. The court then rejected the State's Twenty-first Amendment argument, finding that the "[d]efendants have not shown that New York's ban on the direct shipment of out-of-state wine, and particularly the in-state exceptions to the ban, implicate the State's core concerns under the Twenty-first Amendment." *Id.*, at 148.

The Court of Appeals for the Second Circuit reversed. 358 F. 3d 223 (2004). The court "recognize[d] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol." *Id.*, at 238. The court nevertheless sustained the New York statutory scheme because, in the court's view, "New York's desire to ensure accountability through presence is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York," *ibid.* As such, the New York direct shipment laws were "within the ambit of the powers granted to states by the Twenty-first Amendment." *Id.*, at 239.

C

We consolidated these cases and granted certiorari on

the following question: "'Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of §2 of the Twenty-first Amendment?'" 541 U. S. 1062 (2004).

For ease of exposition, we refer to the respondents from the Michigan challenge (Nos. 03–1116 and 03–1120) and the petitioners in the New York challenge (No. 03–1274) collectively as the wineries. We refer to their opposing parties—Michigan, New York, and the wholesalers and retailers—simply as the States.

II

A

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994). See also *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 274 (1988). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 539 (1949). States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979).

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Cf. U. S. Const., Art. I, §10, cl. 3. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented. See *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 390 (1994) (citing The Federalist No. 22, pp. 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362–363 (G. Hunt ed. 1901)).

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that protect local wineries have led to the enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. Riekhof & Sykuta, 27 Regulation, No. 3, at 30. Prior to 1986, all but three States prohibited direct-shipments of wine. The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries. *Ibid.* The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the prod-

uct of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951). See also *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 521–523 (1935).

B

The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.

The New York regulatory scheme differs from Michigan's in that it does not ban direct shipments altogether. Out-of-state wineries are instead required to establish a distribution operation in New York in order to gain the privilege of direct shipment. N. Y. ABC Law §§3(37), 96. This, though, is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system. New York and those allied with its interests defend the scheme by arguing that an out-of-state winery has the same access to the State's consumers as in-state wineries: All wine must be sold through a licensee fully accountable to New York; it just so happens that in order to become a licensee, a winery must have a physical presence in the State. There is some confusion over the precise steps out-of-state wineries must take to gain access to the New York

market, in part because no winery has run the State's regulatory gauntlet. New York's argument, in any event, is unconvincing.

The New York scheme grants in-state wineries access to the State's consumers on preferential terms. The suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations. In-state producers, with the applicable licenses, can ship directly to consumers from their wineries. §§76–a(3), 76(4) (West Supp. 2005), and §77(2) (West 2000). Out-of-state wineries must open a branch office and warehouse in New York, additional steps that drive up the cost of their wine. §§3(37), 96 (West Supp. 2005). See also App. in No. 03–1274, pp. 159–160 (Affidavit of Thomas G. McKeon, General Counsel to the New York State Liquor Authority). For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive. It comes as no surprise that not a single out-of-state winery has availed itself of New York's direct-shipping privilege. We have "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145 (1970). New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 72 (1963). See also *Ward* v. *Maryland*, 12 Wall. 418 (1871).

In addition to its restrictive in-state presence requirement, New York discriminates against out-of-state wineries in other ways. Out-of-state wineries that establish the requisite branch office and warehouse in New York are still ineligible for a "farm winery" license, the license that provides the most direct means of shipping to New York

consumers. N. Y. ABC Law §76–a(5) ("No licensed farm winery shall manufacture or sell any wine not produced exclusively from grapes or other fruits or agricultural products grown or produced in New York state"). Out-of-state wineries may apply only for a commercial winery license. See §§3(37), 76. Unlike farm wineries, however, commercial wineries must obtain a separate certificate from the state liquor authority authorizing direct shipments to consumers, §77(2) (West 2000); and, of course, for out-of-state wineries there is the additional requirement of maintaining a distribution operation in New York. New York law also allows in-state wineries without direct-shipping licenses to distribute their wine through other wineries that have the applicable licenses. §76(5) (West Supp. 2005). This is another privilege not afforded out-of-state wineries.

We have no difficulty concluding that New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws.

III

State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). The Michigan and New York laws by their own terms violate this proscription. The two States, however, contend their statutes are saved by §2 of the Twenty-first Amendment, which provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The States' position is inconsistent with our precedents and with the Twenty-first Amendment's history. Section 2 does not allow States to regulate the direct shipment of

wine on terms that discriminate in favor of in-state producers.

A

Before 1919, the temperance movement fought to curb the sale of alcoholic beverages one State at a time. The movement made progress, and many States passed laws restricting or prohibiting the sale of alcohol. This Court upheld state laws banning the production and sale of alcoholic beverages, *Mugler* v. *Kansas*, 123 U. S. 623 (1887), but was less solicitous of laws aimed at imports. In a series of cases before ratification of the Eighteenth Amendment the Court, relying on the Commerce Clause, invalidated a number of state liquor regulations.

These cases advanced two distinct principles. First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor. *Scott* v. *Donald*, 165 U. S. 58 (1897); *Walling* v. *Michigan*, 116 U. S. 446 (1886); *Tiernan* v. *Rinker*, 102 U. S. 123 (1880). In *Walling*, for example, the Court invalidated a Michigan tax that discriminated against liquor imports by exempting sales of local products. The Court held that States were not free to pass laws burdening only out-of-state products:

> "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States." 116 U. S., at 455.

Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce. *Rhodes* v. *Iowa*, 170 U. S. 412 (1898); *Vance* v. *W. A. Van-*

dercook Co., 170 U. S. 438 (1898); *Leisy* v. *Hardin*, 135 U. S. 100 (1890); *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888). For example, in *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888), the Court struck down an Iowa statute that required all liquor importers to have a permit. *Bowman* and its progeny rested in part on the since-rejected original-package doctrine. Under this doctrine goods shipped in interstate commerce were immune from state regulation while in their original package. As the Court explained in *Vance*,

> "the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by Interstate Commerce remain under the shelter of the Interstate Commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the state." 170 U. S., at 444–445.

Bowman reserved the question whether a State could ban the sale of imported liquor altogether. 125 U. S., at 499–500. Iowa responded to *Bowman* by doing just that but was thwarted once again. In *Leisy*, *supra*, the Court held that Iowa could not ban the sale of imported liquor in its original package.

Leisy left the States in a bind. They could ban the production of domestic liquor, *Mugler*, *supra*, but these laws were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package, *Leisy*, *supra*. To resolve the matter, Congress passed the Wilson Act (so named for Senator Wilson of Iowa), which empowered the States to regulate imported liquor on the same terms as domestic liquor:

"That all fermented, distilled, or other intoxicating liq-

> uors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Ch. 728, 26 Stat. 313 (codified at 27 U. S. C. §121).

By its own terms, the Wilson Act did not allow States to discriminate against out-of-state liquor; rather, it allowed States to regulate imported liquor only "to the same extent and in the same manner" as domestic liquor.

The Court confirmed this interpretation in *Scott*, *supra*. *Scott* involved a constitutional challenge to South Carolina's dispensary law, 1895 S. C. Acts p. 721, which required that all liquor sales be channeled through the state liquor commissioner. 165 U. S., at 92. The statute discriminated against out-of-state manufacturers in two primary ways. First, §15 required the commissioner to "purchase his supplies from the brewers and distillers in this State when their product reaches the standard required by this Act: Provided, Such supplies can be purchased as cheaply from such brewers and distillers in this State as elsewhere." 1895 S. C. Acts p. 732. Second, §23 of the statute limited the State's markup on locally produced wines to a 10-percent profit but provided "no such limitation of charge in the case of imported wines." 165 U. S., at 93. Based on these discriminatory provisions, the Court rejected the argument that the South Carolina dispensary law was authorized by the Wilson Act. *Id.*, at 100. It explained that the Wilson Act was "not intended to confer upon any State the power to discriminate injuri-

ously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce." *Ibid.* To the contrary, the Court said, the Wilson Act mandated "equality or uniformity of treatment under state laws," *ibid.*, and did not allow South Carolina to provide "an unjust preference" to its products "as against similar products of the other States," *id.*, at 101. The dissent also understood the validity of the dispensary law to turn in large part on §§15 and 23, but argued that even if these provisions were discriminatory the correct remedy was to sever them from the rest of the Act. *Id.*, at 104–106 (opinion of Brown, J.).

Although the Wilson Act increased the States' authority to police liquor imports, it did not solve all their problems. In *Vance* and *Rhodes*—two cases decided soon after *Scott*—the Court made clear that the Wilson Act did not authorize States to prohibit direct shipments for personal use. In *Vance*, the Court characterized *Scott* as embodying two distinct holdings: First, the South Carolina dispensary law "amount[ed] to an unjust discrimination against liquors, the products of other States." 170 U. S., at 442. This aspect of the *Scott* holding, which confirmed the Wilson Act's nondiscrimination principle, was based "on particular provisions of the law by which the discrimination was brought about." 170 U. S., at 442. Second, "in so far as the law then in question forbade the sending . . . of intoxicating liquors for the use of the person to whom it was shipped, the statute was repugnant to [the Commerce Clause]." *Ibid.* (citing *Scott*, 165 U. S. 58). See also 170 U. S., at 443 (distinguishing between the provisions at issue in *Scott* "which were held to operate a discrimination" and those which barred direct shipment for personal use).

This second holding, that consumers had the right to receive alcoholic beverages shipped in interstate commerce

for personal use, was only implicit in *Scott*. 165 U. S., at 78, 99–100. The Court expanded on this point, however, not only in *Vance* but again in *Rhodes*. *Rhodes* construed the Wilson Act narrowly to avoid interference with this right. The Act, the Court said, authorized States to regulate only the resale of imported liquor, not direct shipment to consumers for personal use. 170 U. S., at 421. Without a clear indication from Congress that it intended to allow States to ban such shipments, the *Rhodes* Court read the words "upon arrival" in the Wilson Act as authorizing "the power of the State to attach to an interstate commerce shipment," only after its arrival at the point of destination and delivery there to the consignee." *Id.*, at 426. See also *id.*, at 424; *Bridenbaugh* v. *Freeman-Wilson*, 227 F. 3d 848, 852 (CA7 2000). The Court interpreted the Wilson Act to overturn *Leisy* but leave *Bowman* intact. *Rhodes*, *supra*, at 423–424. The right to regulate did not attach until the liquor was in the hands of the customer. As a result, the mail-order liquor trade continued to thrive. Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 353, 364–365 (1917).

After considering a series of bills in response to the Court's reading of the Wilson Act, Congress responded to the direct-shipment loophole in 1913 by enacting the Webb-Kenyon Act, 37 Stat. 699, 27 U. S. C. §122. See Rogers, *supra*, at 363–370. The Act, entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," provides:

> "That the shipment or transportation . . . of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State . . . into any other State . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, pos-

> sessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." 37 Stat., at 699–700.

The constitutionality of the Webb-Kenyon Act itself was in doubt. *Vance* and *Rhodes* implied that any law authorizing the States to regulate direct shipments for personal use would be an unlawful delegation of Congress' Commerce Clause powers. Indeed, President Taft, acting on the advice of Attorney General Wickersham, vetoed the Act for this specific reason. S. Rep. No. 103, 63 Cong., 1st Sess., 3–6 (1913); 30 Op. Atty. Gen. 88 (1913). Congress overrode the veto and in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917), a divided Court upheld the Webb-Kenyon Act against a constitutional challenge.

The Court construed the Act to close the direct-shipment gap left open by the Wilson Act. States were now empowered to forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms. *Id.*, at 321–322 (noting that the West Virginia law at issue in *Clark Distilling* "forbade the shipment into or transportation of liquor in the State whether from inside or out"). The Court understood that the Webb-Kenyon Act "was enacted simply to extend that which was done by the Wilson Act." *Id.*, at 324. The Act's purpose "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Ibid.* The Court thus recognized that the Act was an attempt to eliminate the regulatory advantage, *i.e.* its immunity characteristic, afforded imported liquor under *Bowman* and *Rhodes*.

Michigan and New York now argue the Webb-Kenyon Act went even further and removed any barrier to discriminatory state liquor regulations. We do not agree. First, this reading of the Webb-Kenyon Act conflicts with that given the statute in *Clark Distilling*. *Clark Distilling* recognized that the Webb-Kenyon Act extended the Wilson Act to allow the States to intercept liquor shipments before those shipments reached the consignee. The States' contention that the Webb-Kenyon Act also reversed the Wilson Act's prohibition on discriminatory treatment of out-of-state liquors cannot be reconciled with *Clark Distilling*'s description of the Webb-Kenyon Act's purpose—"simply to extend that which was done by the Wilson Act." 242 U. S., at 324. See also *McCormick & Co.* v. *Brown*, 286 U. S. 131, 140–141 (1932).

The statute's text does not compel a different result. The Webb-Kenyon Act readily can be construed as forbidding "shipment or transportation" only where it runs afoul of the State's generally applicable laws governing receipt, possession, sale, or use. Cf. *id.*, at 141 (noting that the Act authorized enforcement of "valid" state laws). At the very least, the Webb-Kenyon Act expresses no clear congressional intent to depart from the principle, unexceptional at the time the Act was passed and still applicable today, *Hillside Dairy Inc.* v. *Lyons*, 539 U. S. 59, 66 (2003), that discrimination against out-of-state goods is disfavored. Cf. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 652–653 (1981) (holding that the McCarran-Ferguson Act, 15 U. S. C. §1011 *et seq.*, removed all dormant Commerce Clause scrutiny of state insurance laws; 15 U. S. C. §1011 provides: "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States").

Last, and most importantly, the Webb-Kenyon Act did not purport to repeal the Wilson Act, which expressly precludes States from discriminating. If Congress' aim in passing the Webb-Kenyon Act was to authorize States to discriminate against out-of-state goods then its first step would have been to repeal the Wilson Act. It did not do so. There is no inconsistency between the Wilson Act and the Webb-Kenyon Act sufficient to warrant an inference that the latter repealed the former. See *Washington* v. *Miller*, 235 U. S. 422, 428 (1914) (noting that implied repeals are disfavored). Indeed, this Court has twice noted that the Wilson Act remains in effect today. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 333, n. 11 (1964); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341, 345, n. 7 (1964). See 27 U. S. C. §121.

The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state. The rule of *Tiernan*, *Walling*, and *Scott* remained in effect: States were required to regulate domestic and imported liquor on equal terms. "[T]he intent of . . . the Webb-Kenyon Act . . . was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, [the Act does not] show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another." *Pacific Fruit & Produce Co.* v. *Martin*, 16 F. Supp. 34, 39–40 (WD Wash. 1936). See also Friedman, Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under Twenty-first Amendment, 21 Cornell L. Q. 504, 509 (1936) ("The cases under the Webb-Kenyon Act uphold state prohibition and regulation in the exercise of the police power yet they clearly forbid laws which

discriminate arbitrarily and unreasonably against liquor produced outside of the state" (footnote omitted)).

B

The ratification of the Eighteenth Amendment in 1919 provided a brief respite from the legal battles over the validity of state liquor regulations. With the ratification of the Twenty-first Amendment 14 years later, however, nationwide Prohibition came to an end. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. Section 2 of the Twenty-first Amendment is at issue here.

Michigan and New York say the provision grants to the States the authority to discriminate against out-of-state goods. The history we have recited does not support this position. To the contrary, it provides strong support for the view that §2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts. "The wording of §2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig* v. *Boren*, 429 U. S. 190, 205–206 (1976) (footnote omitted).

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

Some of the cases decided soon after ratification of the Twenty-first Amendment did not take account of this history and were inconsistent with this view. In *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936), for example, the Court rejected the argument that the Amendment did not authorize discrimination:

> "The plaintiffs ask us to limit this broad command [of §2]. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

The Court reaffirmed the States' broad powers under §2 in a series of cases, see *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939), and unsurprisingly many States used the authority bestowed on them by the Court to expand trade barriers. T. Green, Liquor Trade Barriers: Obstructions to Interstate Commerce in Wine, Beer, and Distilled Spirits 4, and App. I (1940) (stating in the wake of *Young's Market* that "[r]ivalries and reprisals have thus flared up").

It is unclear whether the broad language in *Young's Market* was necessary to the result because the Court also stated that "the case [did] not present a question of discrimination prohibited by the commerce clause." 299 U. S., at 62. The Court also declined, contrary to the approach we take today, to consider the history underlying the Twenty-first Amendment. *Id.*, at 63–64. This reluctance did not, however, reflect a consensus that such evidence was irrelevant or that prior history was unsupportive of the principle that the Amendment did not authorize discrimination against out-of-state liquors. There was ample opinion to the contrary. See, *e.g.*, *Young's Market Co.* v. *State Bd. of Equalization of Cal.*, 12 F. Supp. 140 (SD Cal. 1935), rev'd, 299 U. S. 59 (1936); *Pacific Fruit*

& Produce Co. v. *Martin, supra,* at 39; *Joseph Triner Corp.* v. *Arundel,* 11 F. Supp. 145, 146–147 (Minn. 1935); Friedman, *supra,* at 511–512; Note, Recent Cases, Twenty-first Amendment—Commerce Clause, 85 U. Pa. L. Rev. 322, 323 (1937); W. Hamilton, Price and Price Policies 426 (1938); Note, Legislation, Liquor Control, 38 Colum. L. Rev. 644, 658 (1938); Wiser & Arledge, Does the Repeal Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce? 7 Geo. Wash. L. Rev. 402, 407–409 (1939); de Ganahl, The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment, 8 Geo. Wash. L. Rev. 819, 822–828 (1940); Note, 55 Yale L. J. 815, 819–820 (1946).

Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.

C

The modern §2 cases fall into three categories.

First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment, *44 Liquormart, Inc.* v. *Rhode Island,* 517 U. S. 484 (1996); the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.,* 459 U. S. 116 (1982); the Equal Protection Clause, *Craig, supra,* at 204–209; the Due Process Clause, *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971); and the Import-Export Clause, *Department of Revenue* v. *James B. Beam Distilling Co.,* 377 U. S. 341 (1964).

Second, the Court has held that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor. *Capital Cities Cable, Inc.* v. *Crisp,* 467 U. S. 691 (1984);

California Retail Liquor Dealers Assn. v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). The argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" for alcoholic beverages has been rejected. *Hostetter*, 377 U. S., at 331–332. Though the Court's language in *Hostetter* may have come uncommonly close to hyperbole in describing this argument as "an absurd oversimplification," "patently bizarre," and "demonstrably incorrect," *ibid.*, the basic point was sound.

Finally, and most relevant to the issue at hand, the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause. *Bacchus*, 468 U. S., at 276; *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986); *Healy* v. *Beer Institute*, 491 U. S. 324 (1989). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman*, *supra*, at 579.

Bacchus provides a particularly telling example of this proposition. At issue was an excise tax enacted by Hawaii that exempted certain alcoholic beverages produced in that State. The Court rejected the argument that Hawaii's discrimination against out-of-state liquor was authorized by the Twenty-first Amendment. 468 U. S., at 274–276. "The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.*, at 276. Despite attempts to distinguish it in the instant cases, *Bacchus* forecloses any contention that §2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny. See also *Brown-Forman*, *supra*, at 576 (invalidating a New York price affirmation statute that required producers to limit the price of liquor based on the lowest price they offered out of state);

Healy, 491 U. S., at 328 (invalidating a similar Connecticut statute); *id.*, at 344 (SCALIA, J., concurring in part and concurring in judgment) ("The Connecticut statute's invalidity is fully established by its facial discrimination against interstate commerce . . . . This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

Recognizing that *Bacchus* is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation. Furthermore, *Bacchus* does not stand alone in recognizing that the Twenty-first Amendment did not give the States complete freedom to regulate where other constitutional principles are at stake. A retreat from *Bacchus* would also undermine *Brown-Forman* and *Healy*. These cases invalidated state liquor regulations under the Commerce Clause. Indeed, *Healy* explicitly relied on the discriminatory character of the Connecticut price affirmation statute. 491 U. S., at 340–341. *Brown-Forman* and *Healy* lend significant support to the conclusion that the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge.

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal, supra*, at 110. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recog-

nized that the three-tier system itself is "unquestionably legitimate." *North Dakota* v. *United States*, 495 U. S., at 432. See also *id.*, at 447 (SCALIA, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

IV

Our determination that the Michigan and New York direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry. We still must consider whether either State regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.*, 486 U. S., at 278. The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection. We consider each in turn.

The States, aided by several *amici*, claim that allowing direct shipment from out-of-state wineries undermines their ability to police underage drinking. Minors, the States argue, have easy access to credit cards and the Internet and are likely to take advantage of direct wine shipments as a means of obtaining alcohol illegally.

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors'

increased access to wine. FTC Report 34. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. *Id.*, at 12. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, "'want instant gratification.'" *Id.*, at 33, and n. 137 (explaining why minors rarely buy alcohol via the mail or the Internet). Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation, *C & A Carbone, Inc.*, 511 U. S., at 393, this is not enough.

Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones. Michigan, for example, already allows its licensed retailers (over 7,000 of them) to deliver alcohol directly to consumers. Michigan counters that it has greater regulatory control over in-state producers than over out-of-state wineries. This does not justify Michigan's discriminatory ban on direct shipping. Out-of-state wineries face the loss of state and federal licenses if they fail to comply with state law. This provides strong incentives not to sell alcohol to minors. In addition, the States can take less restrictive steps to minimize the risk that minors will order wine by mail. For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package.

The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion. With regard to Michigan, however, the tax-collection argument is a diversion. That is because Michigan, unlike many other States, does not rely on wholesalers to collect taxes on wines imported from out-of-state. Instead, Michigan collects taxes directly from out-of-state wineries on all wine shipped to in-state wholesalers. Mich. Admin. Code Rule 436.1725(2) (1989) ("Each outside seller of wine shall submit . . . a wine tax report of all wine sold, delivered, or imported into this state during the preceding calendar month"). If licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments.

New York and its supporting parties also advance a tax-collection justification for the State's direct-shipment laws. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries. The State offers no reason to believe the system would prove ineffective for out-of-state wineries. Licensees could be required to submit regular sales reports and to remit taxes. Indeed, various States use this approach for taxing direct interstate wine shipments, *e.g.*, N. H. Rev. Stat. Ann. §178.27 (Lexis Supp. 2004), and report no problems with tax collection. See FTC Report 38–40. This is also the procedure sanctioned by the National Conference of State Legislatures in their Model Direct Shipping Bill. See, *e.g.*, S. C. Code Ann. §61–4–747(C) (West Supp. 2004).

Michigan and New York benefit, furthermore, from provisions of federal law that supply incentives for winer-

ies to comply with state regulations. The Tax and Trade Bureau (formerly the Bureau of Alcohol, Tobacco, and Firearms) has authority to revoke a winery's federal license if it violates state law. BATF Industry Circular 96–3 (1997). Without a federal license, a winery cannot operate in any State. See 27 U. S. C. §204. In addition the Twenty-first Amendment Enforcement Act gives state attorneys general the power to sue wineries in federal court to enjoin violations of state law. §122a(b).

These federal remedies, when combined with state licensing regimes, adequately protect States from lost tax revenue. The States have not shown that tax evasion from out-of-state wineries poses such a unique threat that it justifies their discriminatory regimes.

Michigan and New York offer a handful of other rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability. These objectives can also be achieved through the alternative of an evenhanded licensing requirement. FTC Report 40–41. Finally, it should be noted that improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail.

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The "burden is on the State to show that 'the *discrimination* is demonstrably justified,'" *Chemical Waste Management, Inc.* v. *Hunt*, 504 U. S. 334, 344 (1992) (emphasis in original). The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. See, *e.g.*,

Maine v. *Taylor*, 477 U. S. 131, 141–144 (1986). Michigan and New York have not satisfied this exacting standard.

V

States have broad power to regulate liquor under §2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

We affirm the judgment of the Court of Appeals for the Sixth Circuit; and we reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with our opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 03–1116, 03–1120 and 03–1274

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, ET AL., PETITIONERS
03–1116 *v.*
ELEANOR HEALD ET AL.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, PETITIONER
03–1120 *v.*
ELEANOR HEALD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUANITA SWEDENBURG, ET AL., PETITIONERS
03–1274 *v.*
EDWARD D. KELLY, CHAIRMAN, NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE LIQUOR AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 16, 2005]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

Congress' power to regulate commerce among the States includes the power to authorize the States to place burdens on interstate commerce. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946). Absent such congressional approval, a state law may violate the unwritten rules described as the "dormant Commerce Clause" either by

imposing an undue burden on both out-of-state and local producers engaged in interstate activities or by treating out-of-state producers less favorably than their local competitors. See, *e.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970); *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978). A state law totally prohibiting the sale of an ordinary article of commerce might impose an even more serious burden on interstate commerce. If Congress may nevertheless authorize the States to enact such laws, surely the people may do so through the process of amending our Constitution.

The New York and Michigan laws challenged in these cases would be patently invalid under well settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine. But ever since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category. Section 2 of the Twenty-first Amendment expressly provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment.[1] On the con-

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[1] In the words of Justice Jackson: "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to

trary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions. The Eighteenth Amendment entirely prohibited commerce in "intoxicating liquors" for beverage purposes throughout the United States and the territories subject to its jurisdiction. While §1 of the Twenty-first Amendment repealed the nationwide prohibition, §2 gave the States the option to maintain equally comprehensive prohibitions in their respective jurisdictions.

The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference. Foremost among them was Justice Brandeis, whose understanding of a State's right to discriminate in its regulation of out-of-state alcohol could not have been clearer:

> "The plaintiffs ask us to limit [§2's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it. . . . Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage impor-

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get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special, constitutional provision." *Duckworth* v. *Arkansas*, 314 U. S. 390, 398–399 (1941) (opinion concurring in result).

tation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 62–63 (1936).[2]

In the years following the ratification of the Twenty-first Amendment, States adopted manifold laws regulating commerce in alcohol, and many of these laws were discriminatory.[3] So-called "dry states" entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors. The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the "demon rum" in the 1920's and 1930's. Indeed, they expressly authorized the "balkanization" that today's decision condemns. Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution;[4] it is not,

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[2] According to Justice Black, who participated in the passage of the Twenty-first Amendment in the Senate, §2 was intended to return "'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 338 (1964) (dissenting opinion).

[3] See generally Green, Interstate Barriers in the Alcoholic Beverage Field, 7 Law & Contemp. Prob. 717 (1940); *post*, at 22–25 (THOMAS, J., dissenting).

[4] Cf. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 169 (1920) (Holmes, J., dissenting) ("I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against special drink. The fathers of the Constitution so far as I know ap-

however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933.

My understanding (and recollection) of the historical context reinforces my conviction that the text of §2 should be "broadly and colloquially interpreted." *Carter* v. *Virginia*, 321 U. S. 131, 141 (1944) (Frankfurter, J., concurring).[5] Indeed, the fact that the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning. Because the New York and Michigan laws regulate the "transportation or importation" of "intoxicating liquors" for "delivery or use therein," they are exempt from dormant Commerce Clause scrutiny.

As JUSTICE THOMAS has demonstrated, the text of the Twenty-first Amendment is a far more reliable guide to its meaning than the unwritten rules that the majority enforces today. I therefore join his persuasive and comprehensive dissenting opinion.

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proved it").

[5] As he added in that case, "since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play." *Carter* v. *Virginia*, 321 U. S., at 143.